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No. 1077

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IN THE

SUPREME COURT OF THE UNITED STATES

MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY,
Plaintiff and Counterdefendant RESPONDENT

vs.

JAMES P. KELLY and YNES KELLY, husband and wife,
Defendants and Counterclaimants APPELLANTS

* * * * * * * * *

JURISDICTIONAL STATEMENT

Appeal from decision of Supreme Court of State of Idaho

JAMES P. KELLY and YNES KELLY, Pro-Se
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IN THE

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MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY, Plaintiff and Counterdefendant RESPONDENT	)
vs.	)
JAMES P. KELLY and YNES KELLY, husband and wife, Defendants and Counterclaimants APPELLANTS	)

* * * * * * * * * *

JURISDICTIONAL STATEMENT

COMES NOW the above Defendants and Appellants and in pursuance to Rule 15, make the following Jurisdictional Statement:

(a) The above case is reported as 459 P2d 349, 93 Idaho ___, copy of which opinion is hereto appended.

(b) This was a case in which the Plaintiff sought an injunction against Defendants to enjoin them from interfering

with the removal of certain wires and poles from the property of Defendants; Defendants countersued, claiming the ownership of the wires and poles and asking for payment for Plaintiff's use of the wires and poles and demanded jury trial. Plaintiff sought Summary Judgment. Lower court dismissed Defendants counter-claim and granted Summary Judgment and Injunction to Plaintiff. Defendants claimed right to trial by jury and appealed to Idaho Supreme Court. Idaho Supreme Court reaffirmed lower court.

(ii) The date of judgment sought to be reviewed is Affirmation of Summary Judgment from Fifth Judicial District Court, ~~entered~~ filed by Supreme Court of State of Idaho on September 29, 1969, and decision denying Petition for Rehearing, ~~entered~~ filed on October 20, 1969. Judgment entered Oct. 21, 1969.

(iii) This appeal is taken pursuant to

28 U S C 1257 (2).

(iv) In that what is at issue here is the right of trial by jury to which Defendants have been denied, the authority for this appeal is the Constitution of the United States, Amendment VII, wherein the "right of trial by jury shall be preserved."

(v) This appeal questions the validity of Rule 56, of Idaho Rules of Civil Procedure, pages 345-360 Idaho Code, volume entitled "Idaho Rules of Civil Procedure":

"Rule 56(a) Summary Judgment--For Claimant--In a district court, a party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment, may, at any time after the expiration of twenty(20) days from the service of process upon the adverse party or his appearance in the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

"Rule 56(b) Summary Judgment--For Defending party--A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"Rule 56(c) Motion for Summary Judgment and proceedings thereon.--The motion shall be served at least ten (10) days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. Such judgment, when appropriate, may be rendered for or against any party to the action.

"Rule 56(d) Case not fully adjudicated on motion for summary judgement--If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material

facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extend to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

"Rule 56(e) Form of affidavits for Summary judgment proceedings--Further testimony--Defense required--Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon mere allegations or denials of his pleadings, but must answer in detail as specific as that of the moving papers, settingforth the material facts as he believes and intends to prove them to be. If he does not so answer under oath, summary judgment shall be entered against him.

"Rule 56(f) When affidavits are unavailable in summary judgment proceed-

ings.--Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

"Rule 56(g) Affidavits in summary judgment proceedings made in bad faith. --Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt."

(c) The question presented by this appeal is whether the right of trial by jury as guaranteed by the Constitution of the United States, Amendment VII, can be violated through use of the Summary Judgment procedure. The right of cross-examation, which is an inherent

part of the right of trial by jury "to face the accuser, to cross examine witnesses" is eroded through the use of summary judgment by a party wishing to avoid the uncertainty of a jury trial. This right is further eroded by a court using the statements, unverified and without the averer thereof undergoing cross-examination, as being completely true.

(d) The plaintiff telephone company constructed without federal permit a telephone line in 1942. In 1948 Defendants moved onto the land and received a patent from the United States for this land in 1960. In 1965 and 1966 the telephone company installed underground equipment on the north edge of the highway, abandoning its old facilities on the south side. Defendants claimed ownership of the poles and wires upon

their land by virtue of their patent from the United States. Plaintiff brought suit in 1966 asking that defendants be enjoined from hindering removal of the old equipment. Defendants claimed facilities were theirs because of their grant from the United States and filed counterclaim for the use of their land since 1960. The District Court in Summary Judgment proceedings granted a judgment for the telephone company and ordered a permanent injunction against the defendants. Defendants appealed to the Idaho Supreme Court and State Supreme Court reaffirmed lower court's decision. The defendants raised the question of their rights to trial by jury as follows:

1. by making demand for trial jury on their answer and counterclaim
2. by oral argument during the

summary judgment

3. by assignment of errors and by written brief in appeal to Supreme Court

4. by oral argument when case was heard by Idaho Supreme Court

5. by written brief on Petition for Rehearing, which was denied on October 20, 1969.

> "That the Defendants do here and now demand jury trial on the law and the facts"
> Transcript p.10 (Answer to Complaint and Counterclaim)
>
> "III There is a Constitutional Question, in that Defendants are entitled by the Constitution of the United States to a jury trial and this they have been denied by this decision of the Trial Court."
> Appellants Brief, P. 2 (Assignment of Errors)

The manner in which they were passed upon by the court - both the lower and appellant courts ignored this question and made no reference whatsoever to it

in their opinions or decisions.

(e) The question of the right of trial by jury is something which is at the very heart of the Constitution of the United States. A starting point for any argument on the Constitution would be the famous case of Marbury v. Madison (1803):

> "The Constitution is either a superior, paramount law: unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts."

Just as Chief Justice Marshall's thoughts put the Constitution above ordinary legislative acts, so also does it put the Constitution above procedural rules whatever court they may be promulgated by.

Today our courts, including this United

States Supreme Court, are "plowing new ground" in reaffirming that the Constitution does indeed give certain unalienable rights to all of its citizens, among which is the right to trial by jury. Appellants are asking this court to uphold and reaffirm this Constitution of the United States. The right of trial by jury is an inherent part of the system of justice in America. This right has been eroded through many channels, one of which is the Idaho rule providing for Summary Judgment. The United States Supreme Court is the "court of last resort" to which its citizens can appeal in an attempt to reaffirm the primacy of the Constitution of the United States. The lower court and the Idaho Supreme Court refused to recognize the Constitution even though

it was properly brought up by the Defendants.

Thomas Jefferson, in commenting upon the United States Constitution, stated that "every generation must make the Constitution work for it", and in asking for this hearing on this important question, the Appellants are "making it work" for all Americans.

James P. Kelly

Ynes Kelly

Appellants, Pro se

ADDENDA

Opinion of Judge Sherman J. Bellwood, filed in Fifth District Court, State of Idaho, County of Jerome, Oct. 15, 1968:

Title & Cause:

On plaintiff's motion for summary judgment. The facts in this case are, for the most part, not in dispute. The facts are: In 1942 the plaintiff constructed a telephone line on the right-of-way of Idaho State Highway No. 25 along the north edge of N½NW¼ of Sec. 22, Twp. 8 South, Range 17, E., B.M., in Jerome County, Idaho, which property extends to the center of said highway. The highway right-of-way extends 200 feet north and 200 feet south of the center line of the highway. In 1948 the defendants moved upon the land above described and have there ever since. On May 17th, 1960, the United States of America issued to defendants a patent for said land. In the patent there was reserved "a right-of-way for a Federal Aid Highway under the Act of November 9, 1921." In 1965 and 1966 plaintiff installed a new telephone line on the north side of said highway right-of-way and it removed a part of the line facilities first above mentioned. Since that time defendants have refused to permit plaintiff to remove the rest of said line. Defendant have never consented to the use by plaintiff of

the telephone line facilities first above mentioned, and in fact the defendants have continuously billed the plaintiff "for the use of said telephone line and defendants' property."

Automobiles and trucks of the plaintiff have traveled up and down State Highway 25 and a county road on the west of defendants' property which intersects said state highway. Sometimes these vehicles travel slowly; sometime they stop on the roadways adjoining defendants property. The drivers and the passengers of said vehicles sometimes park at the aforementioned intersection, walk up upon adjoining property and look down upon defendants' property. In June of 1966 there was a man who identified himself as being connected with the telephone company - a Mr. Carpenter - who was with another man; they came upon defendants' property; defendants asked them to leave; they did. Before they left they attempted to talk with defendants. Plaintiff filed this lawsuit November 17, 1966, naming Mrs. Kelly as a party defendant. On one occasion, a State Electrical Inspector - Whitey Gates - went to an electrical supplier in Jerome and asked how much J. P. Kelly buys and when he buys it. James P. Kelly believes, but does not know, that this inquirer acts for the plaintiff. When a part of the telephone line in question was removed, as aforesaid, it was removed, according to Kelly, in the nighttime. When this lawsuit was filed the Sheriff of Jerome County served process upon the defendants at their home. On one occasion when Defendant Kelly was outside his home, on his

property, someone who has never been identified fired a rifle bullet which caused Mr. Kelly to fall to the ground and seek cover.

Out of these facts the plaintiff seeks the assistance of this Court in the removal of its telephone poles and lines from the north edge of the defendants' property on the highway right-of-way.

Out of these facts defendants claim ownership of the telephone line and its facilities. They seek to recover, for the privilege of plaintiff's use of the polelines, wires and appurtenances, $95,150.00 plus $26,005.81 accumulated interest, from January 27, 1958. Additionally, the Defendants seek to recover $540,000.00 "punitive" damages for wilful, deliberate and malicious harrassment which damaged the health and general welfare of the defendants. Defendants also seek injunction against plaintiff's continued harrassment.

In 1963 the defendants filed a suit in the U.S. District Court for Idaho, Southern Division, against the plaintiff and others, including "Professional Gunman No. 1 and Professional Gunman No. 2" whose true names were not known, seeking to recover $44,012,379.62 damages. The action included, among others, the claims in this present lawsuit. The U. S. District Court dismissed the action for a variety of reasons, including failure to state a claim, lack of jurisdiction for no federal question and for no diversity of citizenship.

The plaintiff is the lawful owner of the poleline it seeks to remove; the plaintiff has the right to remove the same from the right-of-way which it lawfully occupies. Plaintiff is entitled to summary judgment on its complaint. Defendants' counterclaim is untenable under the facts. Plaintiff is entitled to summary judgment on defendant's counterclaim.

The Court considered the pleadings, the depositions of the defendants, the interrogatories to plaintiff and plaintiff's answers thereto, deposition exhibits A, B, C and 1, the summons and complaint filed in the U. S. District Court in case No. 3841 which was lodged at the summary judgment hearing, the arguments of counsel and defendants at said hearing.

Counsel for plaintiff will prepare order for summary judgment and summary judgment in accordance herewith.

Dated and copies mailed to plaintiff's counsel and the defendants this 14th day of October, 1968.

Sherman J. Bellwood
Judge, District Court

##########

Order granting Motion for Summary Judgment, filed October 24, 1968:

Title & Cause:

A motion having been regularly made by the Plaintiff herein for Summary Judgment in the Plaintiff's favor for the relief demanded in the Complaint and in the Plaintiff's favor dismissing Defendants' Counterclaim on the ground that there is no genuine issue as to any material fact and that the Plaintiff is entitled to Judgment as a matter of law;

Now, on considering the Pleadings, Deposition of Defendants, Interrogatories to Plaintiff and Plaintiff's answers thereto, deposition Exhibits A, B, C and the Summons and Complaint filed in the United States District Court in Case No. 3841 and arguments of counsel and Defendants at the hearing, and due deliber-

ation having been had, and the decision of the Court having been filed, it is

Ordered that said motion be and the same hereby is granted, and that Judgment be entered herein in the Plaintiff's favor for the relief demanded in the Complaint and in the Plaintiff's favor dismissing Defendants' Counterclaim.

Dated this 23rd day of October, 1968.

Sherman J. Bellwood
Judge, District Court

##########

Judgment, filed October 24, 1968

Title & Cause: A motion by the Plaintiff above-named for summary judgment in its favor for the relief demanded in the Complaint and in its favor dismissing Defendants' Counterclaim, having been duly brought on to be heard, and the Court having made an

Order pursuant thereto granting the Plaintiff's motion and directing that Judgment be entered herein in the plaintiff's favor for the relief demanded in the Complaint and in its favor dismissing Defendants' Counterclaim with costs and disbursements, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendants and each of them, be and they are hereby permanently restrained and enjoined from preventing, hindering and obstructing Plaintiff or Plaintiff's employees from removing its telephone poles, wires and related and similar property, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendants' Counterclaim be and the same is hereby dismissed.

Dated this 23rd day of October,

1968.

Sherman J. Bellwood
Judge, District Court

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Affirmation by Supreme Court

In the Supreme Court of the State of Idaho

Twin Falls, September Term, 1969
No. 10361
Filed Sep 29, 1969
Martin V. Huff, Clerk

Appeal from the District Court of the Fifth Judicial District of the State of Idaho, in and for Jerome County. Honorable Sherman J. Bellwood, District Judge.

Action to enjoin defendant-appellants interferring with the removal of telephone facilities. Summary judgment for plaintiff from which appellants appeal. Affirmed.

Stephan & Balleisen, Twin Falls, attorneys for respondent.

James P. Kelly and Ynes Kelly, Jerome, appellants, appearing pro-se

PER CURIAM

Appellants, James P. Kelly and Ynes Kelly, are the owners of real property situated in Jerome County, Idaho. Prior to their acquisition of the property, the State of Idaho secured a highway right-of-way across the property from the federal government in conformance with the Federal Aid Highway Act of 1921 (42 Stat. 212). Also prior to acquisition of the property by the Kellys, Plaintiff-respondent, telephone company, placed and thereafter maintained telephone poles and lines upon and along said highway right-of-way. Plaintiff-respondent sought to remove its telephone facilities and defendant appellants prevented the removal claiming ownership of the

facilities and that they were entitled to delinquent rental for the use of the facilities. Plaintiff-respondent brought action to enjoin defendant-appellants from hindering its efforts to remove the facilities. Plaintiff sought and gained summary judgment in the district court and defendants appeal.

This Court in State v. Kelly, 89 Idaho 139, 403 P2d 566 (1965), held that the portion of highway right-of-way in controversy here not used for actual road purposes is not forfeited to the owner of the fee title. The telephone company had the clear legal right to place and maintain their facilities upon the highway right-of-way, Idaho Constitution, Article 11, § 13, § 62-701, I.C., and such facilities impose no additional burden for which the owner of the fee is entitled to compensation. U.S. v.

Oklahoma Gas & Electric Co., 318 U.S. 206, 63 Sup. Ct. 534 (1943).

The entry of summary judgment by the district court is affirmed. Costs to respondents.

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SUPREME COURT, U. S.

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No. 1077

IN THE

Supreme Court of the United States

October Term, 1969

JAMES P. KELLY and YNES KELLY
Appellants,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, a corporation,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF IDAHO

MOTION TO DISMISS AND BRIEF OF APPELLEE THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY IN SUPPORT THEREOF

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ON APPEAL FROM THE SUPREME COURT OF IDAHO

MOTION TO DISMISS AND BRIEF OF APPELLEE THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY IN SUPPORT THEREOF

Pursuant to Rule 16, Appellee, The Mountain States Telephone and Telegraph Company, moves to dismiss the appeal from the final judgment of the Supreme Court of the State of Idaho on the following ground:

The appeal does not present any substantial Federal question.

STATEMENT

The Appellee, The Mountain States Telephone and Telegraph Company, accepts as essentially accruate the Appellant's statement of the case set forth in pages 1-9 of the Appellants' Jurisdictional Statement.

BRIEF IN SUPPORT OF MOTION TO DISMISS

The Appeal Does Not Present Any Substantial Federal Question

The sole issue which is raised on this appeal is whether summary judgment procedure *per se* violates the Appellants' constitutional right of trial by jury. The Appellee believes that the question has already been resolved against the Appellants by the Court in its prior decision in *Fidelity & Deposit Co. of Maryland v. United States*, 187 U.S. 315 (1902). There, the Court was faced with the question of the constitutionality of a summary judgment proceeding under Rule 73d of the then Supreme Court of the District of Columbia (now designated the United States District Court for the District of Columbia). The Court sustained summary judgment proceedings in the face of the attack that the defendant was thereby deprived of its constitutional right to a jury trial.

Another case in which the Court had the opportunity of discussing the right of trial by jury was *In Re Peterson*, 253 U.S. 300 (1920). There, the lower Court appointed an auditor for the purpose of resolving certain issues which were in contention between the parties. The plaintiff in the Trial Court sought a Writ of Prohibition against this procedure contending that it infringed the right to jury trial. The Court made the following statement:

> "The command of the Seventh Amendment that 'the right of trial by jury shall be preserved' does not require that old forms of practice and procedure be retained. [citation] It does not prohibit the introduc-

tion of new methods for determining what facts are actually in issue, nor does it prohibit the introduction of new rules of evidence. Changes in these may be made. New devices may be used to adapt the ancient institution to present needs and to make of it an efficient instrument in the administration of justice. Indeed, such changes are essential to the preservation of the right. The limitation imposed by the amendment is merely that enjoyment of the right of trial by jury be not obstructed, and that the ultimate determination of issues of fact by the jury be not interfered with.

"In so far as the task of the auditor is to define and simplify the issues, his function is, in essence, the same as that of pleading. The object of each is to concentrate the controversy upon the questions which should control the result. [citation] No one is entitled in a civil case to trial by jury, unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury to require, with a view to formulating the issues, an oath by each party to the facts relied upon. [citation] Nor does the requirement of a preliminary hearing infringe the constitutional right, either because it involves delay in reaching the jury trial, or because it affords opportunity for exploring in advance the evidence which the adversary purposes to introduce before the jury. [citation] In view of these decisions, it cannot be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor." pages 309-310

The *Fidelity* and *Peterson* cases appear to the Appellee to be determinative of the issue. However, as further support, we respectfully direct the Court's attention to *Nave v. City of Seattle*, 68 Wash. 2d 721, 415 P. 2d 93 (1966), appeal dismissed 385 U.S. 450, rehearing denied 386 U.S. 929 (1967). There, the plaintiff-appellant's suit was dis-

missed in the Trial Court on motion for summary judgment. He appealed to the Washington Supreme Court, raising the Federal Constitutional question of the denial of his right to trial by jury because of the summary judgment. The Trial Court decision was affirmed. On appeal to this Court, the case was dismissed "for want of a substantial federal question" at page 450.

Further, the Appellee believes this Court has already ruled indirectly in favor of the constitutionality of Rule 56 of the Idaho Rules of Civil Procedure. That Rule, as quoted by the Appellants in their Jurisdictional Statement, is practically a verbatim duplication of Rule 56 of the Federal Rules of Civil Procedure. The Court in at least two instances has upheld summary judgment proceedings under Rule 56 of the Federal Rules of Civil Procedure. *United States v. United States Gypsum Company*, 340 U.S. 76 (1950) and *Associated Press v. United States*, 326 U.S. 1 (1945). Admittedly, neither of these cases raised the specific issue of the constitutionality of Rule 56. However, it is assumed that if the Court had substantial reservations concerning the propriety of Rule 56 it could have and would have raised this issue. Its failure to do so, we believe, indicates that there is no substantial Federal question involved concerning the validity of Rule 56.

In passing, the Appellee believes that this appeal would more properly have been brought before the Court on a Petition for Certiorari under the provisions of Title 28 of the United States Code, § 1257. However, the Appellee also recognizes that the Court has the statutory authority, under Title 28 of the United States Code, § 2103, to consider the appeal as a Petition for Certiorari. Accordingly, the Appellee does not object thereto; but, in the event that the Court does wish to consider this as a Petition for Certiorari, the Appellee desires to tender the within Brief as its Brief in Opposition to the Granting of Certiorari pursuant to Rule 24 of this Court.

CONCLUSION

The sole question raised by this appeal; i.e., does summary judgment procedure infringe upon the constitutional right to a trial by jury, is not substantial having been previously resolved by the Court. It is respectfully submitted, that for these reasons, the appeal should be dismissed.

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January 22, 1970

SUPREME COURT OF THE UNITED STATES

October Term, 1969

KELLY ET UX. *v.* MOUNTAIN STATES TELEPHONE & TELEGRAPH COMPANY

APPEAL FROM THE SUPREME COURT OF IDAHO

No. 1077. Decided February 24, 1970

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.